to a relevant part of the record in the lower court, your respondent desires to direct the attention of this court to the opinion of the lower court (Tr. 76) and to a finding of the lower court (Tr. 77) which discloses the omission in the record presented by the Petitioner. Your respondents beg the indulgence of this court in quoting from the opinion of the lower court the following short paragraph.

> (Tr. 77) (emphasis is ours when used herein.)
> The record discloses that *appellant appeared and testified* in the partition suit, and that Richard A. Harewood and Benjamin G. Clanton, who filed an answer in his behalf, *testified that they were acting as attorneys for appellant.* This testimony was given *in the presence of appellant*, and further, *appellant testified in the cause generally.*

Had the petitioner printed the *entire* record in the court below, that is the Supreme Court of Illinois, there would have been included in such record an *Additional Abstract of the record in the trial court* which would have set forth the facts found by the court below and set forth as above. The petitioner in his Summary Statement attempts, by omitting this part of the record, to make it appear to this court that he had no notice of the suit in the trial court (Superior Court of Cook County) and that he never heard about the matter until he obtained present counsel and filed his motion to vacate the decree of partition in the trial court. The Court below has stated the true facts and your respondent wishes to call these facts to the attention of the court.

This court has held that it will not exert its jurisdiction merely to review a decision of a State Court upon a question of fact, and once a case is otherwise before it, this court generally will not re-examine the State Court's findings and conclusions of fact.* By an examination of the

* *Grayson* v. *Harris*, 267 U.S. 352, 358; *Portland R. Co.* v. *Railroad Commission*, 229 U.S. 397, 412.

record filed by Petitioner as his printed record, *and* examination of the Opinion of the court below, especially the paragraph noted by your respondent, it becomes obvious that a relevant part of the record in the court below has been omitted by the Petitioner. The petitioner claims throughout his petition that the *trial court and the court below have been under a mis-apprehension.* If he had printed the entire record of the court below and brought that record before this court, it would become obvious that there was *no mis-apprehension on the part of either of the courts* below.

The Opinion below.

The opinion of the Supreme Court of Illinois is reported (Tr. 76-78) in *Finley* v. *Crossley*, at 100 N. E. (2) 606, 409 Ill. 435.

Jurisdiction.

The petitioner sets forth on page 9 of his petition, Section 1254 (1) of the judicial code, as revised by Act of June 25, 1948 (28 U.S.C.A. 1254) and rule 12 (1) of the supreme court rules. It appears to your respondents that this section is applicable only to cases in *courts of appeals* and that 28 U.S.C. 1257 is applicable here as the petitioner asks for a writ to the highest Court of a State, in this case the Supreme Court of Illinois.

The opinion of the lower court (Tr. 77) sets forth that the *appellant contends* that he was deprived of his property without due process of law in violation of the state and federal constitutions in that his property was taken from him *without any notice* and *without an opportunity to be heard.* The court is directed to the opening statements of this brief as to whether the petitioner had notice of the proceedings in the trial court and in the court below.

As to the matter of *an opportunity to be heard* the court is directed to pages 31-49 of the printed record and noted in that record as Report of Proceedings. The petitioner was heard at length by the trial court and the contention of the petitioner that he was not heard is not proven by the record.

The court below merely presents this contention of the petitioner in its opinion *but* decides the case on entirely different grounds, having nothing to do with any federal question. The lower court (Tr. 77) states as follows:

> It would seem the question presented here is whether or not Appellant entered his appearance in the proceedings.

and the lower court decides this question only and further states (Tr. 78):

> We are of the opinion, *after a careful analysis of this record*, that the facts as shown were sufficient to justify the lower court in striking the petition of appellant.

The lower court has not passed on any constitutional question, nor did it evade any such issue. The lower court decided only the question as to whether the appellant entered his appearance, a question of fact and local law, and whether the trial court was correct in striking the petition of the appellant.

It is the contention of the respondent that a writ of certiorari under section 1257 of the U. S. Code *may* be granted where the petitioner raises a substantial federal question. The court will not take cognizance of a claim grounded upon a mere reference to the Constitution or Due Process. *Bowe* v. *Scott*, 233 U. S. 658, 664-5. The court below rested its decision on facts having no relation to any substantial federal question. A litigant by merely losing his case in the lower court, cannot rely on a generalized statement as his being deprived of his property in violation of state and federal constitutions.

ARGUMENT.

The petitioner presents three questions:

(1) The petitioner stresses 'without a hearing' when the record shows (Tr. 31-49) the court gave him an extended hearing. The petitioner does not set forth specifically wherein he was denied due process and is a mere conclusion on his part.

(2) The Petitioner disputes the fact that the Masters Report was a part of the record in the court below. He cannot set up such a defense as a motion was filed in the court below for admission of this report as part of the record in that court and the Petitioner made *no objection at that time* and the court below made this report part of the record and called this part of the record volume 2. Furthermore in the court below the appellees, respondents herein, filed a printed abstract of that part of the record, and it is to that abstract and the record below that the court below refers to in its opinion (Tr. 77). Your respondents have referred to this omission in their opening paragraph of this brief.

(3) The petitioner questions the jurisdiction of the trial court over the petitioner and the court below has found as a matter of fact based on the record in the court below that the court had jurisdiction over the petitioner.

The petitioner states in his conclusion that the decision will affect 'millions of present and future litigants' (Petition pg 20). The opinion of the court below indicates clearly that this statement of the petitioner is exagerated

and that the only persons affected by this decision are the particular litigants and *no one else.*

The petitioner cannot *now* re-litigate and re-argue the case as he had in the court below and furthermore the petitioner cannot *now* complain of the record in the court below when *he has not presented* a record to this court which supports his contentions. The only record that the petitioner has presented to this court is the decision of the court below and an abstract of the record in the trial court which was printed for the court below together with his petition for a re-hearing. He has complained of the report of the Master in the trial court, *but* he has not brought up even the abstract of such record which was filed in the court below in order to prove his contentions. The jurisdiction of this court to re-examine the final judgment of a State Court cannot arise from mere inference but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right. *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655. The record before the court is incomplete and inconclusive *and* had the petitioner printed the entire record in the court below then this court would have had proof that the petitioner had notice and that he had a hearing in the lower court. The opinion of the court below states as follows: (Tr. 78)

> "We are of the opinion, *after a careful analysis of the record . . .*"

The federal right which the petitioner seems to assert is that the proceedings in the trial court and in the court below were without notice and without a hearing and because of that he was deprived of his property in violation of the Federal and State Constitutions. The petitioner has the obligation to *show* distinctly the parts of the record to

support his contentions. The statement of the court below as set forth above should not be disregarded merely on the statement of the petitioner *without* clear support from the record in the court below and the Petitioner has the obligation *to present that record to* this court.

Respectfully submitted.

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December 14, 1951.